181 (2)

No. 10-859

In The Supreme Court of the United States

DEBORAH J. PRUNTY, *et al.*,
Petitioners,

v.

ROY M. TERRY, JR.,
CHAPTER 7 TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY THE PETITIONERS

Issue # I: If a Virginia state court issues a Final Decree of Divorce that establishes Debtor's rights in all property acquired during his marriage, whether the Bankruptcy Court is required to give full faith and credit to the state court's order on that issue? Is relitigation of an issue decided by the state court barred by collateral estoppel and *res judicata*?

Issue # II: Whether a Chapter 7 Debtor has any interest in real property that was purchased with assets owned by Debtor's ex-wife before their marriage, if, under Virginia law, all property owned by the ex-wife before her marriage is her separate property to which debtor has no claim?

Issue # III: Whether a Chapter 7 Trustee may use 11 U.S.C. [§] 544 to nullify the legal effect of "tenants by the entireties" in a deed held by Debtor and his non-debtor spouse?

Issue # IV: In a case which the Debtor signs a written agreement containing a promise to quitclaim certain real property to an ex-wife pursuant to a Marital Agreement, whether the date of transfer, for the purposes of 11 U.S.C. [§] 547[(b)](4), is the date the agreement was signed or the date the Debtor actually signed the deed?

Issue # V: Whether, under Virginia law, the Debtor's refusal to sign a quitclaim deed pursuant to a Marital Agreement gave his ex-wife a "right to payment," thus turning the ex-wife into a creditor?

Issue # VI: Whether the ex-wife is an insider of the Debtor if the Debtor was convicted of domestic violence (Assault & Battery) against the non-debtor ex-wife, who had to get a protective order before the date of divorce?

Issue # VII: By recovering her property owned before her marriage, whether Debtor's ex-wife received more than she would have in a Chapter 7 liquidation?

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STATEMENT OF THE CASE

A. Nature of the Case

This case arises in the context of an interlocutory appeal from a bankruptcy adversary proceeding. The bankruptcy trustee's theory of the case is that the transfers of debtor's interest in real property in Fauquier and Midlothian (the "Properties") from debtor to Prunty during their marriage were preferential transfers (the "Transfers"), which if avoided under 11 U.S.C. § 547, would result in the Properties continuing to be held as tenancy by the entirety until converted to tenants in common upon their pre-petition divorce, so that on June 3, 2007, the date debtor filed a voluntary petition seeking relief under Chapter 7 of the Bankruptcy Code (the "Petition Date"), the bankruptcy trustee's "strong arm" powers as a hypothetical lien creditor under 11 U.S.C. § 544(a)(1) and bona fide purchaser under 11 U.S.C. § 544(a)(3) gave the bankruptcy trustee a one-half interest in the co-owned Properties which he could recover from transferees under 11 U.S.C. § 550, bring into the estate under 11 U.S.C. § 541(a)(3), and sell under 11 U.S.C. § 363(h).

B. Statement of Facts

Respondent objects to the Petitioners characterizing the subject Properties as Prunty's separate property because **the state court never found that the Properties were Prunty's "separate property."** At most, the state court only incorporated into the Final Decree of Divorce whatever property allocation debtor and Prunty

agreed to in the Marital Agreement. In turn, the Marital Agreement expressly states that debtor has an interest in the Properties, which he agreed to convey to Prunty by deed.[1] Pet. App. 12 (Stip. ¶ 41). The reason debtor needed to convey the Properties to Prunty by deed is that they were title at acquisition as tenants by the entirety. Pet. App. 5 (Stip. ¶ 19), 9 (Stip. ¶ 30).

Respondent objects to the Petitioners' misleading assertion that "all of the money used to purchase the Properties came from assets owned by Prunty before the marriage" because the Midlothian Property was acquired in part with debt, *see* Pet. App. at 10 (Stip. ¶ 31), and less than three weeks after purchase of the Fauquier Property a substantial amount of equity was withdraw by Prunty via a bank loan that was to be repaid by debtor and Prunty, *see id.* at 5-6 (Stip. ¶¶ 17-24).

Respondent objects to Petitioners' Fact section because the Petitioners are trying to introduce new allegations of "fact" not found in the record (*compare, e.g.*, Pet. ¶¶ 3, 5, at 4, 5, *with* Pet. App.), and some dates are incorrect (*compare, e.g.*, Pet. at 4 (stating March 31, 2006), *with* Pet. App. at 13-14 (Stip. ¶¶ 44-47, stating March 31, 2005); *compare, e.g.*, Pet. at

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[1] For each Property, the Marital Agreement § 15(a)(2) states: "The parties agree that the Wife shall become the exclusive owner of such property and that the Husband shall relinquish his interest in the marital property to the Wife. Husband agrees to convey to the Wife by Quit Claim Deed all of his right, title and interest in said property to Deborah Paschall Trustee of the Deborah J. Prunty Living Trust dated June 26, 2002".

5 (stating August 13, 2006), *with* Pet. App. at 15 (Stip. ¶¶ 57-58, stating August 23, 2006)).

All necessary facts are in the Stipulation of Facts (Pet. App. at 1 *et seq.*) and will not be repeated here. An excellent narrative of the relevant facts can also be found in the Memorandum Opinions entered by U.S. District Court (Pet. App. at 67-72) and Bankruptcy Court (*Id.* at 30-36).

ARGUMENT

PREFACE: This entire dispute could have been avoided if Prunty complied with the law.

The last sentence of Virginia Code § 20-107.3(C) on domestic relations law states "**All orders or decrees which divide or transfer or order division or transfer of real property between the parties shall be recorded** and indexed in the names of the parties in the appropriate grantor and grantee indexes in the land records in the clerk's office of the circuit court of the county or city in which the property is located." VA. CODE ANN. § 20-107.3(C) (emphasis added). The Petitioners assert that in practice, most divorce lawyers ignore this requirement and just record the deed affecting the transfer. But you ignore the law at your own peril. In most cases that shortcut does not create a problem, but in this case it did.

In this case, Prunty's failure to comply with the law has come back to haunt her. If Prunty had complied with the law by recording the order in land

records, she would have won. She would have given notice to the world, outside the preference look-back period, that debtor did not have an interest in the Properties, which would have prevented the bankruptcy trustee from avoiding the Transfers. Ultimately, Prunty's failure to comply with the law is what allows the bankruptcy trustee to win.

Issue # I: If a Virginia state court issues a Final Decree of Divorce that establishes Debtor's rights in all property acquired during his marriage, whether the Bankruptcy Court is required to give full faith and credit to the state court's order on that issue? Is relitigation of an issue decided by the state court barred by collateral estoppel and *res judicata*?

In the appeal to the Court of Appeals for the Fourth Circuit (hereinafter "4th Circuit"), the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by failing to give full faith and credit to the Final Decree of Divorce, which incorporated the terms of the Marital Agreement by reference, based on the principles of collateral estoppel and *res judicata*?**

A. Full Faith and Credit

1. Prunty has waived her right to argue full faith and credit. The Petitioners are trying to elevate a passing mention of full faith and credit at trial level into the lead argument on appeal to the U.S. Supreme Court. Unfortunately they did not sufficiently bring the full faith and credit argument to the bankruptcy court's attention. On appeal, the U.S. District Court observed that Prunty did not cite any portion of the record showing that she raised this issue in the bankruptcy court, and the district court's review of the record revealed no reference to this argument in bankruptcy court. Pet. App. at 85 (Memo. Op. (E.D. Va.)). The U.S. District Court affirmed the bankruptcy court's ruling. *Id.* The 4th Circuit likewise affirmed for reasons stated by the district court. *Id.* at 94 (Op. (4th Cir.)). The Petitioners now request the U.S. Supreme Court hear the case because their counsel told the bankruptcy court that she "read some of the federal cases on the issue of collateral estoppel and the state – Federal Courts having to recognize full faith and credit . . . . *See* Pet. App. 23-25. Respondent asserts that because the Petitioners did not timely raise this argument in a sufficient manner to focus the bankruptcy court's attention on the issue, they have waived their right to make this argument. *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993).

2. Prunty has grounded her argument in the full faith and credit clause of the U.S. Constitution, which does not apply to this case. At some point, the Petitioners need to be held to what they are actually arguing. The Petitioners assert that "[b]y refusing to be bound by the rulings of state courts on the same issues raised in subsequent bankruptcy cases, the Fourth Circuit is violating the full faith and credit clause of the U.S. Constitution." Pet. at 9; *see also* Pet. App. at 104 (quoting full faith and credit clause in U.S. CONST. art. IV, § 1). However, by its own terms, this constitutional provision applies only to states. Consequently, full faith and credit for judicial proceedings is constitutionally required only where both the first and the second suit are in state court. Because the bankruptcy court is a federal court rather than a state court, the full faith and credit clause in the U.S. Constitution does not apply to this case.

3. There is no split among the Circuits. The Petitioners argue the Petition should be granted because "[t]he Fourth Circuit's dismissal of Prunty's appeal conflicts with a prior ruling in the Fourth Circuit and with [a] ruling in the Ninth Circuit, both of which gave full faith and credit to state court orders in family law cases." Pet. at 6. The first case cited by the Petitioners, *D'Agostino v. Genovese (In re Genovese)*, No. 95-1984, 1996 U.S. App. LEXIS 24046 (4th Cir. 1996) (unpublished), is distinguishable because it dealt with 11 U.S.C. § 523, and unlike our case, it met all the elements for collateral estoppel. The only other case cited by

the Petitioners is *Shawhan v. Shawhan (In re Shawhan)*, No. NV-08-1049-JuKuK, 2008 Bankr. LEXIS 4694 (B.A.P. 9th Cir. 2008), a case which is prefaced by a notice that the disposition is not appropriate for publication and that it has no precedential value under 9th Cir. BAP Rule 8013-1. In *Shawhan*, the court held that the debtor was not allowed to step into the trustee's shoes to use the trustee's avoidance powers because the debtor essentially sought to restore ownership of the marital residence to himself and not for the benefit of his estate or his creditors. *See id.* at *15, *45. Significantly, the court in *Shawhan* did not hold that the trustee could not use his avoidance powers for the benefit of the estate and the creditors.

4. The lower court rulings properly honor both federal and Virginia law. While the Marital Agreement and Final Decree of Divorce may determine the rights in the Properties between Prunty and debtor, under Virginia law it has no effect between Prunty and third parties (or debtor and third parties) until it is recorded in the land records.[2]

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[2] Perhaps this is why the last sentence of Virginia Code § 20-107.3(C) on domestic relations law states "All orders or decrees which divide or transfer or order division or transfer of real property between the parties shall be recorded and indexed in the names of the parties in the appropriate grantor and grantee indexes in the land records in the clerk's office of the circuit court of the county or city in which the property is located." VA. CODE ANN. § 20-107.3(C).

A bankruptcy trustee stands in debtor's shoes in some respects, but a bankruptcy trustee also has rights that the debtor does not have. Most important to this case, these rights include the bankruptcy trustee's rights as a hypothetical lien creditor under Bankruptcy Code § 544(a)(1), and rights as a bona fide purchaser of real estate under Bankruptcy Code § 544(a)(3).

Under Bankruptcy Code § 544(a)(1), Prunty's unrecorded divorce decree is not capable of blocking the Chapter 7 Bankruptcy Trustee's hypothetical lien claim against real property transferred by that divorce decree. *See Phillips v. Chandler*, 215 B.R. 684, 689 (E.D. Va. 1997) (Williams, J.) (*discussing* 11 U.S.C. § 544(a)(1)); *accord Tribby v. Tribby*, 26 Va. Cir. 372, 374, 1992 Va. Cir. LEXIS 132 (1992) (holding an unrecorded property settlement agreement incorporated into a final divorce decree is void against judgment lien creditors).

Under Bankruptcy Code § 544(a)(3), the rights and powers of the Chapter 7 Bankruptcy Trustee as a bona fide purchaser of real estate trumps Prunty's unrecorded domestic relations order. *See Peyton v. Robinson (In re Robinson)*, 346 B.R. 172, 177 (Bankr. E.D. Va. 2006) (*discussing* 11 U.S.C. § 544(a)(3)); *Mayer v. United States (In re Reasonover)*, 236 B.R. 219, 232 (Bankr. E.D. Va. 1999) ("Under Virginia recording statutes, unrecorded conveyances and deeds of trust are 'void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors.' VA. CODE ANN. § 55-96(A)(1). Furthermore, it is well established in

Virginia that a bona fide purchaser takes property free of any latent equity against it.").

B. Res Judicata: claim preclusion and collateral estoppel

The doctrine of *res judicata* encompasses two concepts: claim preclusion and issue preclusion (aka collateral estoppel). The Petitioners have raised them both.

1. Application of *res judicata* in this case violates the Chapter 7 Trustee's due process rights. "As the trustee in bankruptcy is distinct from the pre-petition debtor, the trustee should not be foreclosed from asserting his position." *Pereira v. Aetna Cas. & Sur. Co. (In re Payroll Express Corp.)*, 921 F. Supp. 1121, 1124 (S.D.N.Y. 1996). The preclusive effect of a prior judgment adjudicated in a pre-petition action abrogates a bankruptcy trustee's due process rights. It is unfair to the bankruptcy trustee (and creditors) to have a prior action, in which the trustee had no notice nor any opportunity to join, prejudicially affect the bankruptcy trustee's rights and the rights of the bankruptcy estate. A bankruptcy trustee is the successor to the debtor for many purposes, but he is much more both in the extraordinary rights with which the Bankruptcy Code invests him, and as a general representative of the creditors. Unless he intervenes and takes on the role of an active litigant subjecting himself thereby to the usual incidents of such action, he should not be bound by a judgment

merely because the debtor was a party defendant in the prior litigation.

2. *Res judicata* is inappropriate because the issues did not exist in the prior proceeding and the debtor lacked standing. *Res judicata* precludes relitigation of issues that could have been litigated in a previous action but were not. The trustee's claims under Bankruptcy Code §§ 547 and 544 could not have been pursued by the debtor in the divorce proceeding: Bankruptcy Code § 547 grants the trustee a federal cause of action that does not exist outside of bankruptcy and prior to the bankruptcy petition date, and the debtor does not have the rights of the trustee under Bankruptcy Code § 544 to bring an action as a hypothetical lien creditor and a bona fide purchaser of real estate. The pre-petition divorce proceeding could not be *res judicata* (claim preclusive) with respect to a cause of action that did not even come into existence until the bankruptcy case was filed, nor one in which the debtor did not have standing to pursue.

3. Claim preclusion is inappropriate. In the lower courts, the Petitioners asserted that a litigant who seeks to bar a claim based upon the defense of *res judicata* must have the following four elements: a) identity of the remedy sought; b) identity of the cause of action; c) identity of the parties; and, d) identity of the quality of the persons for or against whom the claim is made. The defendants have the burden of proving by a preponderance of the

evidence that the elements of claim preclusion have been established.

a. The remedy sought by the bankruptcy trustee is not identical to the state remedy. The remedy sought by the bankruptcy trustee in the § 547(b) preference complaint before this Court is that the Transfers to defendants be declared null and void and that the plaintiff be awarded judgments against the defendants. This remedy is not identical to the state remedy because the state remedy sought a determination of rights while the current action seeks a return and turnover of the Properties or monetary judgment.

b. The causes of action are not identical. Here the first cause of action was a state divorce proceeding with property rights determined under Virginia statutes. However, the second cause of action, the bankruptcy preference action, is based upon the federal Bankruptcy Code. The two causes of action are rooted in not only different statutory language, but also different bodies of law.

Nor do the causes of action contain the same factual and legal issues. The first cause of action was a determination of property rights based on a marital agreement, whereas the legal and factual issues in this preferential transfer action gravitate toward the determination of whether the elements of a § 547(b) avoidable preference have been satisfied.

Finally, the evidence supporting both causes of action are not the same. Therefore, the causes of action are not identical.

c. The parties are not identical. A bankruptcy trustee is different than a pre-petition debtor. A bankruptcy trustee acts as a general representative of the creditors, and has special powers. The rights of creditors were not considered in the pre-bankruptcy suit. The bankruptcy trustee's "strong arm" powers under Bankruptcy Code § 544 as a hypothetical lien creditor and bona fide purchaser of real property are very important to this case. These powers of the bankruptcy trustee generally are not available to the debtor; and such powers do not even exist for the bankruptcy trustee until the bankruptcy case is filed. The court should not preclude the bankruptcy trustee from pursing a cause of action that the debtor could not have litigated because the debtor lacked standing.

d. The "qualities of persons" test weighs against *res judicata*. The bankruptcy trustee is separate and distinct from the debtor. Moreover, the bankruptcy trustee acts as a general representative of creditors, whereas debtor/defendant Paschall and defendant Prunty were insiders acting for their own self-interest at the time of the Transfers in question. The Transfers between husband and wife that the bankruptcy trustee seeks to avoid diminished the bankruptcy estate available for debtor's unsecured creditors. Accordingly, the identity of the quality of the persons for or against whom the claim is made weighs against *res judicata*.

4. Issue preclusion (aka collateral estoppel) is inappropriate. In *TransDulles Ctr. v. Sharma*, 252 Va. 20, 472 S.E.2d 274 (Va. 1996), the Virginia Supreme Court identified five elements necessary for collateral estoppel to apply: a) the parties or privies in both the proceedings must be the same; b) the factual issues litigated actually must have been litigated in the prior action; c) the issue litigated must have been essential to the prior judgment; d) the prior action must have resulted in a valid and final judgment against the party sought to be precluded in the present action; and, e) there must be mutuality between the parties. As with claim preclusion, the defendants have the burden of proving by a preponderance of the evidence that the elements of issue preclusion have been established.

a. For reasons previously stated, the parties or privities in both the proceedings are not the same.

b. The factual issues were not actually litigated in the prior action. The bankruptcy trustee is not trying to have the bankruptcy court redetermine ownership rights in the Properties. What the bankruptcy trustee is trying to do is avoid the Transfers (*i.e.*, recordation of the Quitclaim Deeds) as preferential transfers under Bankruptcy Code § 547, assert rights under Bankruptcy Code § 544 as a hypothetical lien creditor (11 U.S.C. § 544(a)(1)) and bona fide purchaser of real property (11 U.S.C. § 544(a)(3)), and recover the Properties under Bankruptcy Code § 550, which brings it into

the bankruptcy estate under Bankruptcy Code § 541(a)(3).

c. The Petitioners have not met her burden of proving the issue was litigated in the prior action.

d. The prior action did not result in a judgment against the bankruptcy trustee.

e. There is no mutuality among the parties.

Issue # II: Whether a Chapter 7 Debtor has any interest in real property that was purchased with assets owned by Debtor's ex-wife before their marriage, if, under Virginia law, all property owned by the ex-wife before her marriage is her separate property to which debtor has no claim?

Respondent objects to the question presented to the extent that it is argumentative, misstates the facts and assumes facts not in the record. *See* objections in Statement of Facts *supra*. In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether Debtor had any interest in the subject property under Virginia law that he could transfer?**

The introductory language of Bankruptcy Code § 547 requires a "transfer of an interest of the debtor

in property." 11 U.S.C. § 547(b). The term "transfer" found in Bankruptcy Code § 547 is used in the "most comprehensive" sense. It is intended to include every means and manner by which property can pass from ownership and possession of another. Any transaction that reduces or extinguishes valuable legal rights is subject to avoidance. The term encompasses voluntary and involuntary transfers.[3]

An "interest of the debtor in property" is not defined by the Bankruptcy Code. *Matson v. Grease Monkey Int'l, Inc. (In re Bev, Inc.)*, 237 B.R. 311, 314 (Bankr. E.D. Va. 1998). State law determines whether an interest in property exists .... *Id.* (*citing American Bankers Insur. Co. of Florida v. Maness*, 101 F.3d 358, 363 (4th Cir. 1996) (*quoting Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979))). The question is whether the challenged transfers involved an interest of the debtor in property such that the transfers diminished the funds from which bankruptcy creditors may be paid.

1. Under Virginia law, debtor had "interests" in the Properties which, if not transferred to Prunty, would have been susceptible to claims of debtor's judgment lien creditors. *See Tribby v. Tribby*, 26 Va. Cir. 372, 374, 1992 Va. Cir. LEXIS 132, *4 (1992). As a general rule, a docketed judgment constitutes a

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[3] Bankruptcy Code § 101(54)(D) broadly defines "transfer" as each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with (i) property; or (ii) an interest in property. 11 U.S.C. § 101(54)(D).

general lien upon all of the debtor's real estate. *Id.* However, the lien attaches only to what the debtor owns – *i.e.*, the actual interest of the judgment debtor in the land. *Id.*

The recording acts cut across these well-recognized principles. *Id.* Virginia Code § 55-96 provides that deeds to real estate and contracts to sell real estate are void as to lien creditors except from the time such instrument is recorded in the county or city where the property lies. *Id.* "**As a result, the interest of a judgment debtor may be determined from the land records and not necessarily from instruments that are unrecorded.**" *Id.* at *5 (emphasis added).

Here, Prunty contends that the doctrine of equitable conversion transformed debtor's interests in the Properties to mere equitable interests on the date the Marital Agreement was made. This contention is correct in some contexts, but it has no effect on debtor's judgment creditors. *Id.* The terms of the Marital Agreement under consideration constitute a contract "made in respect to real estate . . . or made for the conveyance or sale of real estate" under Virginia Code § 11-1; and, as such, were void as against debtor's judgment creditors under Virginia Code § 55-96. *Id.*

The fact that the property settlement agreement was affirmed by the divorce court and incorporated by reference in the Final Decree of Divorce adds nothing to the equation. *Id.* Incorporation does nothing more than allow the court to enforce the contract through its contempt powers pursuant to Virginia Code § 20-

109.1. *Id.* It has no effect on the Marital Agreement's validity vis-a-vis third parties. *Id.*

Therefore, if the debtor had not made the Transfers, on the Petition Date debtor's interests in the Properties would have been susceptible to debtor's judgment lien creditors, including the Chapter 7 Trustee exercising his powers as a hypothetical lien creditor under Bankruptcy Code § 544(a)(1). *See Tribby*, 26 Va. Cir. at 374, 1992 Va. Cir. LEXIS 132, *4; *Phillips v. Chandler*, 215 B.R. 684, 689 (E.D. Va. 1997) (Williams, J.) (holding an unrecorded divorce decree is not capable of blocking a Chapter 7 Bankruptcy Trustee's hypothetical lien claim against real property transferred by that divorce decree).

2. Under Virginia law, debtor had "interests" in the Properties which, if transferred to a bona fide purchaser for value on the Petition Date, would have defeated equitable titles transferred to Prunty. *See Peyton v. Robinson (In re Robinson)*, 346 B.R. 172, 177 (Bankr. E.D. Va. 2006) (*discussing* 11 U.S.C. § 544(a)(3)); *Mayer v. United States (In re Reasonover)*, 236 B.R. 219, 232 (Bankr. E.D. Va. 1999) ("Under Virginia recording statutes, unrecorded conveyances and deeds of trust are 'void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors.' VA. CODE ANN. § 55-96(A)(1). Furthermore, it is well established in Virginia that a bona fide purchaser takes property free of any latent equity against it.").

3. Even if debtor only had legal interests in the Properties, the Chapter 7 Trustee's avoidance powers would trump claims based solely on debtor's lack of equitable title. *See Mayer v. United States (In re Reasonover)*, 236 B.R. 219, 228 (Bankr. E.D. Va. 1999). "Section 541(d) as it now reads does not, expressly or by fair implication, limit or abrogate the trustee's ability to recover property under his avoidance powers simply because the debtor has no equitable interest in that property." *Id.*

4. Debtor had an interest in the Properties. Initially debtor held the Properties with his wife as tenants by the entirety. If nothing else had happened, the debtor's undivided interest in the Properties held as tenants by the entirety as of the Petition Date would have been included in debtor's bankruptcy estate. *See Fairfield v. United States (In re Ballard)*, 65 F.3d 367, 371 (4th Cir. 1995). However, the parties transferred the Properties pre-petition from the tenancy by the entirety to Prunty. **If the Transfers are avoided as preferential transfers, the Transfers and the deed recorded in land records are a nullity and of no effect.** *See Coleman v. Cmty. Trust Bank (In re Coleman)*, 426 F.3d 719, 726 (4th Cir. 2005) ("To 'avoid,' in legal context, means 'to render void.'"). Recorded deeds that are null and void are insufficient to put third parties on notice. The Properties would continue to be held as tenancy by the entirety until the pre-petition divorce, which would have converted debtor's interest in the Properties from tenancy by the entirety to tenants in common. VA. CODE ANN.

§ 20-111; *Cordova v. Mayer (In re Cordova)*, 73 F.3d 38, 39 (4th Cir. 1996). The proper date to determine the trustee's powers under Bankruptcy Code § 544 as a hypothetical lien creditor and bona fide purchaser of real property is the Petition Date. The bankruptcy trustee does not just step into the shoes of the debtor, he also gets whatever interest a hypothetical lien creditor and bona fide purchaser of real property could get in the Properties on the Petition Date. *See* 11 U.S.C. § 544(a).

The Petitioners assert that the Marital Agreement and Virginia Code § 20-107.3 somehow changes this result. The Respondent disagrees as it is contrary to prior rulings that are directly on point: the transfer of real property pursuant to Virginia equitable distribution statutes may determine the rights between married couples, but such decree is not capable of blocking claims of third parties until such decree is recorded. *Phillips v. Chandler*, 215 B.R. 684, 689 (E.D. Va. 1997) (Williams, J.).

In *Phillips* the court held that "**[T]he recording requirements of [Virginia Code] § 20-107.3(C) are absolute determinants of whether a decree has validity**." *Phillips*, 215 B.R. *at* 688. The court noted that the Virginia legislature amended Virginia Code § 20-107.3(C) to require divorce decrees transferring real property be recorded. Read in a light most deferential to Virginia law makers, the recording requirements of Virginia Code § 20-107.3 can only be construed as an embodiment of the legislature's intention to eliminate hidden interests in real property. *Id.* To etch the contours of Virginia Code § 20-107.3(C) completely outside the ambit of

Virginia Code § 55-96(A)(1) is to ignore a legitimate, concerted effort by Virginia law makers to promote public notice of real property transfers and to eliminate hidden interests in real property. *Id.* It is error to not read Virginia Code § 20-107.3(C) into the ambit of Virginia Code § 55-96(A)(1). *Id.* Failure to do so would allow and in fact legalize instances of fraud against innocent and bona fide purchases and/or properly perfected lien creditors. *Id.* Accordingly, the court concluded as a matter of law "that [Virginia Code] § 55-96(A)(1) operates to void the transfer of real property embodied in an unrecorded decree of divorce." *Id.* at 689. The court found "that the debtor had an interest in the former marital residence to which the trustee's hypothetical lien could have attached at the time of the [bankruptcy petition] filing." *Id.* Restated, "under [Virginia Code] §§ 55-96(A) and 20-107.3(C) an unrecorded divorce decree is void *to the extent that it is not capable of blocking* claims against the property *until such time* as the decree is recorded. When the divorce decree is recorded, its legal force in preempting claims is restored." *Id.*

5. Debtor had a one-half interest in the Properties. Even if Prunty paid the full purchase price for the Properties held in entirety estate, it is presumed that she made a gift to her co-tenant of an undivided one-half interest in the Properties. *See Sundin v. Klein*, 221 Va. 232, 234, 269 S.E.2d 787, 792 (1980). Prunty asserts that Virginia Code § 20-107.3(A)(3)(h) overturns the common law presumption that forms the basis for the ruling in

Sundin. It does not. Virginia Code § 20-107.3(A)(3)(h) expressly limits the presumption to contests under that section (*i.e.*, limited to dividing up property between parties of a dissolving marriage). *See* VA. CODE § 20-107.3(A)(3)(h) ("No presumption of gift shall arise **under this section** . . . .") (emphasis added). It changes the presumption between the parties of a dissolving marriage, but it does not change the common law presumption for third-parties until it is put to record.

6. Congress intended this result. The Petitioners conclude that Congress did not intend for a bankruptcy trustee to marshall the assets from third-parties using avoidance powers under § 547 [and § 544], then distribute those assets to debtor's creditors. With all due respect to the Petitioners, the majority rule is that "allowing the estate to 'benefit from property that the debtor did not own' is exactly what the strong-arm powers are about: they give the trustee the status of a bona fide purchaser for value, so that the estate contains interests to which the debtor lacked good title." *See DVI Fin. Serv., Inc. v. DVI Bus. Credit Corp (In re DVI, Inc.)*, 306 B.R. 496, 502 (Bankr. Del. 2004); *accord Belisle v. Plunkett*, 877 F.2d 512, 516 (7th Cir. 1989)); *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443, 1452 (6th Cir. 1994).

Issue # III: Whether a Chapter 7 Trustee may use 11 U.S.C. [§] 544 to nullify the legal effect of "tenants by the entireties" in a deed held by Debtor and his non-debtor spouse?

1. The Petitioners have waived this argument because the issue was not raised in the courts below. This is the first time the Petitioners have raised this issue. *See, e.g.*, Pet. App. at 74 (Memo. Op. (E.D. Va.) (issue excluded from court's summary of issues on appeal)).

2. This hypothetical issue is moot because it was not the basis for the lower courts' ruling. The lower courts did not use 11 U.S.C. § 544 to nullify the legal effect of "tenants by the entireties"; rather the lower courts held that the Chapter 7 Trustee was entitled to recover the debtor's interest in the Properties because entry of the Final Decree of Divorce converted the tenancies by the entireties into tenancies in common by operation of state law. Pet. App. at 53 (Memo. Op. (Bankr. E.D. Va.) *citing* VA. CODE ANN. § 20-111); *id.* at 73 (Memo. Op. (E.D. Va.).

Issue # IV: In a case which the Debtor signs a written agreement containing a promise to quitclaim certain real property to an ex-wife pursuant to a Marital Agreement, whether the date of transfer, for the purposes of 11 U.S.C. 547(4) [*sic*], is the date the agreement was

signed or the date the Debtor actually signed the deed?

This issue is more simply stated as follows:

What is the proper date of transfer for the purposes of 11 U.S.C. § 547(b)(4)?

This is a threshold issue and key to this case. For purposes of preferential transfer analysis, the date of transfer is defined by statute. The bankruptcy court and U.S. District Court are correct: for purposes of § 547, the challenged transfers occurred on August 23, 2006 – the date the Quitclaim Deeds were executed. Pet. App. at 48 (Memo. Op. (Bankr. E.D. Va.), 79-80 (Memo. Op. (E.D. Va.)).

The Bankruptcy Code governs the time when a transfer is deemed to occur. Section 547 provides that "[a] transfer of real property . . . is perfected when a bona fide purchaser of such property . . . cannot acquire an interest that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(A). Under this provision, perfection is the key to determining when a § 547 transfer occurred. That determination must be made by reference to state law. Virginia recording statutes provide that contracts in writing and deeds are "void to all purchasers for valuable consideration without notice not parties thereto . . . until and except from the time it is duly admitted to record . . . ." VA. CODE ANN. § 55-96.

When the Bankruptcy Code deems a transfer of real property to have occurred depends on the time elapsed between the transfer and the date such

transfer was perfected. Bankruptcy Code § 547(e)(2) provides:

> For the purposes of this section, . . . a transfer is made –
>
> (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, . . . ;
>
> (B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or
>
> (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –
>
> (i) the commencement of the case; or
>
> (ii) 30 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2). Because the Quitclaim Deeds for the Properties were perfected by recordation within 30 days after such deeds were executed, for purposes of Bankruptcy Code § 547, the transfers of debtor's interests in the Properties were made on August 23, 2006 – the date the Quitclaim Deeds were executed. *See id.*

For purposes of Bankruptcy Code § 547, the U.S. District Court properly concluded that the operative transfer is execution of the Quitclaim Deeds, not the

Marital Agreement. Pet. App. at 79-80 (Memo. Op. (E.D. Va.)). The Marital Agreement is merely a contract for the conveyance or sale of real estate. *Id.* at 43 (Memo. Op. (Bankr. E.D. Va.) *citing* VA. CODE ANN. § 11-1)). Under Virginia law, contracts in writing and deeds are "void to all purchasers for valuable consideration without notice not parties thereto . . . *until and except from the time it is duly admitted to record.*" *Id.* at 80 (Memo. Op. (E.D. Va.) *citing* VA. CODE ANN. § 55-96) (emphasis added by court)). "Therefore, the Marital Agreement did not create a 'transfer' under § 547 because it was not perfected by recording as required by Virginia law." *Id.* "Instead, the Marital Agreement provided Prunty with nothing more than an inchoate interest in the Debtor's share of the Properties, and the Debtor held his undivided one-half interest in the Properties until the transfer was perfected by recording the signed quitclaim deeds." *Id.*

Issue # V: Whether, under Virginia law, the Debtor's refusal to sign a quitclaim deed pursuant to a Marital Agreement gave his ex-wife a "right to payment," thus turning the ex-wife into a creditor?

In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by ruling that Prunty was a creditor of the Debtor at the time the deeds were signed?**

In order for the bankruptcy trustee to avoid a preferential transfer, the transfer must be to or for the benefit of a creditor. *See* 11 U.S.C. § 547(b)(1). The Bankruptcy Code definition of the term "creditor" includes an "entity that has a claim against the debtor that arose at the time of or **before the order for relief** concerning the debtor." 11 U.S.C. § 101(10)(A) (emphasis added). The Bankruptcy Code further defines "claim" as follows:

> (5) The term "claim" means—
>
> (A) right to payment . . . ; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

The Petitioners assert Prunty was not a creditor because she did not have a "claim" (*i.e.*, she did not have a right to payment and she did not have a right to an equitable remedy for breach of performance where such breach gave rise to a right to payment). The Respondent disagrees. Before the preferential transfers occurred, Prunty held a contingent claim against the debtor under both the Marital Agreement and the Final Decree of Divorce. The Petitioners' argument ignores that Prunty could enforce her rights under the Marital Agreement using normal contract law, which could have

resulted in a money judgment. The Petitioners' argument also ignores that Prunty could have enforced the Final Decree of Divorce under Virginia Code § 20-107.3(K), which gives the court "continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order . . . ."

Accordingly, before the preferential transfers occurred, Prunty had a claim against the debtor (*i.e.*, debtor was obligated to transfer the Properties to Prunty pursuant to the Marital Agreement and Final Decree of Divorce, Prunty had the right to a money judgment or equitable remedy if debtor did not transfer such Properties), and such claim arose on or before the order for bankruptcy relief was entered. Therefore, Prunty was a "creditor" before the preferential Transfers occurred.

Issue # VI: Whether the ex-wife is an insider of the Debtor if the Debtor was convicted of domestic violence (Assault & Battery) against the non-debtor ex-wife, who had to get a protective order before the date of divorce?

Respondent objects to the question presented to the extent that it is argumentative and contains irrelevant, immaterial or scandalous matter. In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by ruling that Prunty was an insider of the Debtor at**

the time the Marital Agreements or the deeds were signed?

1. Insider relationship is determined on the exact date of the challenged transfer. "The language of [Bankruptcy Code] section 547(b)(4)(B) clearly states that an insider relationship is to be determined on the *exact date* of the challenged transfer." *Dent v. Martin*, 86 B.R. 290, 292 (S.D. Fla. 1988) (*quoting McWilliams v. Gordon (In re Camp Rockhill, Inc.)*, 12 B.R. 829, 834 (Bankr. E.D. Pa. 1981) (emphasis in original)); 2 COLLIERS ON BANKRUPTCY ¶ 101.31, at 101-143 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) ("Such creditor must be an insider at the time of the transfer in order for the trustee to avoid the transfer.").

2. At the time of the challenged transfers, Prunty was married to the debtor. In this case, the Quitclaim Deeds were dated August 23, 2006 *see* Pet. App. at 15 (Stip. ¶¶ 57 & 58), which is after the parties divorce trial on July 31, 2006, *see id.* at 15 (Stip. ¶ 56), but before the Final Decree of Divorce was entered on September 13, 2006, *see id.* (Stip. ¶ 60). In the lower courts the Petitioners asserted that for all intents and purposes, debtor and Prunty were divorced when the deeds were executed. *Id.* The Respondent disagrees as it is contrary to Virginia law.

Rendition of a judgment is the pronouncement of the judgment by the court. 11A M.J., Judgment and Decrees § 29. A good deal of controversy and variety of conclusions on the time when a judgment takes effect has been put to rest in Virginia by the

enactment of Virginia Code § 8.01-2(4) which provides that "rendition of a judgment means the time at which the judgment is signed and dated." KENT SINCLAIR & LEIGH MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE, Judgments and Decrees § 14.2[C] (5th ed. 2008) (*quoting* VA. CODE ANN. § 8.01-2(4)); *accord* Virginia Supreme Court Rule 1:1 ("The date of entry of any final judgment order, or decree shall be the date the judgment, order, or decree is signed by the judge."). Because the Final Decree of Divorce was signed by Judge Jeffrey W. Parker on September 13, 2006, the debtor and Prunty were still married at the time the Quitclaim Deeds were recorded on August 23, 2006.

3. At the time of the challenged transfers, Prunty was an "insider" because she was married to the debtor. The Bankruptcy Code defines the term "insider", stating that the term includes "a relative of the debtor". 11 U.S.C. § 101(31)(A)(i). The definition of insider is subject to 11 U.S.C. § 102(3) which states that the term "includes" and "including" are not limiting.

The term "relative" is then defined as an "individual related by affinity or consanguinity within the third degree as determined by common law . . . ." 11 U.S.C. § 101(45). "The word affinity refers to a relationship by marriage, as distinguished from a relationship by blood, or consanguinity." *Sumski v. Daggett (In re Hoxie)*, Adv. No. 02-1127-JMD, 2003 Bankr. LEXIS 950 *7 (Bankr. D.N.H. 2003) (*citing* Garner, A Dictionary of Modern Legal Usage, 2d ed. (1995); BLACK'S LAW DICTIONARY, 7th ed. (1999)).

"A spouse of the debtor is a relative as defined by section [101(45)] because the definition includes individuals 'related by affinity'." *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 585 (B.A.P. 9th Cir. 1987). A leading bankruptcy treatise agrees:

> The definition of 'relative' does not explicitly state 'and shall include the spouse' as did paragraph (27) of the former Act. The phrase is unnecessary as an 'individual related by affinity' describes an individual related by marriage – thus, the individual's spouse, is, of course, included. However, a former spouse will not be considered a relative, as the definition should be applied as of the time the transaction took place. But if, for example, the transferee of an alleged preferential transfer was still a spouse at the time of the transfer sought to be avoided, then the transferee would be deemed an "insider" and the trustee would have the power to avoid such a transfer.

2 COLLIERS ON BANKRUPTCY ¶ 101.45, at 101-184.

4. The example in the legislative history is exactly on point. In the lower courts, the Petitioners relied on *Barnhill v. Vaudreuil (In re Busconi)*, 177 B.R. 153 (Bankr. D. Mass. 1995), but that case has been strongly criticized even within the 1st Circuit. The problem with *Barnhill* is that it failed to realize that the definition of affinity for estate law purposes was different than the definition for bankruptcy

purposes, and was contrary to the Bankruptcy Code's legislative history which is directly on point:

> In *Barnhill*, the bankruptcy court found that under applicable state law statutes of descent and distribution, spouses were not related by affinity and that Congress had not expressly mentioned spouses in the definition of "relative". [*Barnhill*, 177 B.R. at 157, citing 23 Am. Jur. 2d Descent and Distribution § 52 (1983).] The bankruptcy court held that a non-debtor spouse was not an insider of the debtor spouse for purposes of the Bankruptcy Code. *Barnhill*, 177 B.R. at 161.
>
> The decision in *Barnhill* is based, in part, upon a detailed analysis of a state statute of descent and distribution which was likely drafted with different policy objectives than those used in drafting the Bankruptcy Code. **The meaning Congress ascribed to the term "relative" is reflected in the legislative history of the Bankruptcy Code when discussing the statutory definition of the term:**
>
> > **[a] former spouse is not a relative, but if, for example, for purposes of the preference section, proposed 11 U.S.C.**

> [§] 547(b)(4)(B), **the transferee was a spouse of the debtor at the time of the transfer sought to be avoided, then the transferee would be a relative and subject to insider rules, even if the transferee were no longer married to the debtor at the time of commencement of the case or at the time of the commencement of the preference proceeding.**
>
> H.R. Rep. No. 95-595, at 313 (1977); S. Rep. No. 95-989, at 26 (1978).

Sumski v. Daggett (In re Hoxie), Adv. No. 02-1127-JMD, 2003 Bankr. LEXIS 950 **8-9 (Bankr. D.N.H. 2003). The facts of this case are the same as the example in the legislative history, which stated that a spouse is an insider. *See id.*

5. The rule that a spouse is an insider is based on common sense. A spouse is an insider. It makes no sense to have a rule based on a definition of affinity that results in a spouse's siblings being classified as an insider but the spouse classified as a non-insider.

Moreover, if a spouse was not an insider, it would open the doors to mischief via inter-spousal transfers in the months leading up to bankruptcy. Currently bankruptcy trustees can identify inter-spousal

transfers from the question on the bankruptcy schedules where debtors must disclose all payments made within one year immediately preceding the commencement of the case to or for the benefit of creditors who are insiders. *See* Stmt. of Fin. Affairs Question 3(c). If a spouse is not an insider, it will be even more difficult for bankruptcy trustees to identify inter-spousal transfers deserving close scrutiny.

Issue # VII: By recovering her property owned before her marriage, whether Debtor's ex-wife received more than she would have in a Chapter 7 liquidation?

Respondent objects to the question presented to the extent that it is argumentative, misstates the facts, and is misleading. *See* objections in Statement of Facts *supra*. In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by ruling that the transfer of the real estate to Prunty permitted Prunty to receive more than she would have in a Chapter 7 liquidation?**

The Chapter 7 Trustee satisfies § 547(b) if the trustee proves that a) the creditor was unsecured; b) the creditor holds a non-priority claim; and c) the estate will not distribute a 100% payout to unsecured creditors. *Matson v. Grease Monkey Int'l, Inc. (In re Bev, Inc.)*, 237 B.R. 311, 315 (Bankr. E.D. Va. 1998).

All three elements are satisfied: a) Prunty is an unsecured creditor holding a contingent claim because she did not record the Marital Agreement or Final Decree of Divorce; b) debts from property settlement agreements are not priority claims; and c) it is undisputed that a 100% distribution to creditors is impossible. *See id.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 10-859

In The Supreme Court of the United States

DEBORAH J. PRUNTY, *et al.*,
Petitioners,

v.

ROY M. TERRY, JR.,
CHAPTER 7 TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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APPENDIX

U.S. CONSTITUTION, Article IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

VIRGINIA STATUTES

§ 8.01-2. General definitions for this title.
As used in this title, unless the context otherwise requires, the term:

. . .

4. "Rendition of a judgment" means the time at which the judgment is signed and dated;

§ 11-1. Certain contracts void as to creditors and purchasers unless in writing; law governing validity of contracts creating security interests.
Every contract, not in writing, made in respect to real estate or goods and chattels in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, and, except as otherwise provided in § 8.2-402 of the Uniform Commercial Code, every bill of sale or contract for the sale of goods and chattels when the

possession is allowed to remain with the seller, shall be void, both at law and in equity, as to purchasers for value and without notice and creditors; provided, however, that if any such contract or bill of sale as is mentioned in this section creates a security interest as defined in the Uniform Commercial Code, its validity and enforceability shall be governed by the provisions of that Code.

§ 20-107.3(A)-(C). Court may decree as to property of the parties.

A. Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, or upon the filing with the court as provided in subsection J of a certified copy of a final divorce decree obtained without the Commonwealth, the court, upon request of either party, shall determine the legal title as between the parties, and the ownership and value of all property, real or personal, tangible or intangible, of the parties and shall consider which of such property is separate property, which is marital property, and which is part separate and part marital property in accordance with subdivision A 3. The court shall determine the value of any such property as of the date of the evidentiary hearing on the evaluation issue. Upon motion of either party made no less than 21 days before the evidentiary hearing the court may, for good cause shown, in order to attain the ends of justice, order that a different valuation date be used. The court, on the motion of either party, may retain jurisdiction in the final decree of divorce to adjudicate the remedy provided by this section

when the court determines that such action is clearly necessary, and all decrees heretofore entered retaining such jurisdiction are validated.

1. Separate property is (i) all property, real and personal, acquired by either party before the marriage; (ii) all property acquired during the marriage by bequest, devise, descent, survivorship or gift from a source other than the other party; (iii) all property acquired during the marriage in exchange for or from the proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property; and (iv) that part of any property classified as separate pursuant to subdivision A 3. Income received from separate property during the marriage is separate property if not attributable to the personal effort of either party. The increase in value of separate property during the marriage is separate property, unless marital property or the personal efforts of either party have contributed to such increases and then only to the extent of the increases in value attributable to such contributions. The personal efforts of either party must be significant and result in substantial appreciation of the separate property if any increase in value attributable thereto is to be considered marital property.

2. Marital property is (i) all property titled in the names of both parties, whether as joint tenants, tenants by the entirety or otherwise, except as provided by subdivision A 3, (ii) that part of any property classified as marital pursuant to subdivision A 3, or (iii) all other property acquired by each party during the marriage which is not

separate property as defined above. All property including that portion of pensions, profit-sharing or deferred compensation or retirement plans of whatever nature, acquired by either spouse during the marriage, and before the last separation of the parties, if at such time or thereafter at least one of the parties intends that the separation be permanent, is presumed to be marital property in the absence of satisfactory evidence that it is separate property. For purposes of this section marital property is presumed to be jointly owned unless there is a deed, title or other clear indicia that it is not jointly owned.

3. The court shall classify property as part marital property and part separate property as follows:

a. In the case of income received from separate property during the marriage, such income shall be marital property only to the extent it is attributable to the personal efforts of either party. In the case of the increase in value of separate property during the marriage, such increase in value shall be marital property only to the extent that marital property or the personal efforts of either party have contributed to such increases, provided that any such personal efforts must be significant and result in substantial appreciation of the separate property.

For purposes of this subdivision, the nonowning spouse shall bear the burden of proving that (i) contributions of marital property or personal effort were made and (ii) the separate property increased in value. Once this burden of proof is met, the owning spouse shall bear the burden of proving that

the increase in value or some portion thereof was not caused by contributions of marital property or personal effort.

"Personal effort" of a party shall be deemed to be labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial, promotional or marketing activity applied directly to the separate property of either party.

b. In the case of any pension, profit-sharing, or deferred compensation plan or retirement benefit, the marital share as defined in subsection G shall be marital property.

c. In the case of any personal injury or workers' compensation recovery of either party, the marital share as defined in subsection H of this section shall be marital property.

d. When marital property and separate property are commingled by contributing one category of property to another, resulting in the loss of identity of the contributed property, the classification of the contributed property shall be transmuted to the category of property receiving the contribution. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, such contributed property shall retain its original classification.

e. When marital property and separate property are commingled into newly acquired property resulting in the loss of identity of the contributing properties, the commingled property shall be deemed transmuted to marital property. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, the

contributed property shall retain its original classification.

f. When separate property is retitled in the joint names of the parties, the retitled property shall be deemed transmuted to marital property. However, to the extent the property is retraceable by a preponderance of the evidence and was not a gift, the retitled property shall retain its original classification.

g. When the separate property of one party is commingled into the separate property of the other party, or the separate property of each party is commingled into newly acquired property, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, each party shall be reimbursed the value of the contributed property in any award made pursuant to this section.

h. Subdivisions A 3 d, e and f of this section shall apply to jointly owned property. No presumption of gift shall arise under this section where (i) separate property is commingled with jointly owned property; (ii) newly acquired property is conveyed into joint ownership; or (iii) existing property is conveyed or retitled into joint ownership. For purposes of this subdivision A 3, property is jointly owned when it is titled in the name of both parties, whether as joint tenants, tenants by the entireties, or otherwise.

B. For the purposes of this section only, both parties shall be deemed to have rights and interests in the marital property. However, such interests and rights shall not attach to the legal title of such property and are only to be used as a consideration

in determining a monetary award, if any, as provided in this section.

C. Except as provided in subsection G, the court shall have no authority to order the division or transfer of separate property or marital property which is not jointly owned. The court may, based upon the factors listed in subsection E, divide or transfer or order the division or transfer, or both, of jointly owned marital property, or any part thereof. The court shall also have the authority to apportion and order the payment of the debts of the parties, or either of them, that are incurred prior to the dissolution of the marriage, based upon the factors listed in subsection E.

As a means of dividing or transferring the jointly owned marital property, the court may transfer or order the transfer of real or personal property or any interest therein to one of the parties, permit either party to purchase the interest of the other and direct the allocation of the proceeds, provided the party purchasing the interest of the other agrees to assume any indebtedness secured by the property, or order its sale by private sale by the parties, through such agent as the court shall direct, or by public sale as the court shall direct without the necessity for partition. All decrees entered prior to July 1, 1991, which are final and not subject to further proceedings on appeal as of that date, which divide or transfer or order the division or transfer of property directly between the parties are hereby validated and deemed self-executing. All orders or decrees which divide or transfer or order division or transfer of real property between the parties shall be

recorded and indexed in the names of the parties in the appropriate grantor and grantee indexes in the land records in the clerk's office of the circuit court of the county or city in which the property is located.

§ 20-111. Decree of divorce from bond of matrimony extinguishes contingent property rights. — Upon the entry of a decree of divorce from the bond of matrimony, all contingent rights of either consort in the real and personal property of the other then existing, or thereafter acquired, including the right of survivorship in real or personal property title to which is vested in the parties as joint tenants or as tenants by the entirety, with survivorship as at common law, shall be extinguished, and such estate by the entirety shall thereupon be converted into a tenancy in common.

§ 55-96(A). Contracts, etc., void as to creditors and purchasers until recorded; priority of credit line deed of trust.

A. 1. Every (i) such contract in writing, (ii) deed conveying any such estate or term, (iii) deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels and (iv) such bill of sale, or contract for the sale of goods and chattels, when the possession is allowed to remain with the grantor, shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record in the county or city wherein

the property embraced in such contract, deed or bill of sale may be. The fact that any such instrument is in the form of or contains the terms of a quit-claim or release shall not prevent the grantee therein from being a purchaser for valuable consideration without notice, nor be of itself notice to such grantee of any unrecorded conveyance of or encumbrance upon such real estate goods and chattels. The mere possession of real estate shall not, of itself, be notice to purchasers thereof for value of any interest or estate therein of the person in possession. As to goods whose possession is retained by a merchant-seller the provisions of subsection (2) of § 8.2-402 of the Uniform Commercial Code shall be controlling. This section shall not apply to any security interest in goods under the Uniform Commercial Code except as provided in subsection (5) of § 8.9-302. Any bill of sale or contract for the sale of goods or chattels when possession is allowed to remain with the grantor shall be deemed to be duly recorded when it is filed in the same manner as Uniform Commercial Code financing statements are filed under the criteria and in the places established by § 8.9A-501 as if the grantor were a debtor and the grantee a secured party. A recordation under the provisions of this section shall, when any real estate subject to the lien of any such contract has been annexed to or merged with an adjoining city subsequent to such docketing, be deemed to have been recorded in the proper clerk's office of such city.

BANKRUPTCY STATUTES (11 U.S.C. § 101 *et seq.*)

Section 101. Definitions

. . .

(5) "claim" means -

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

. . .

(10) "creditor" means -

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

. . .

(31) "insider" includes -

(A) if the debtor is an individual -

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

. . . .

(45) "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree;

. . . .

(54) The term "transfer" means –

. . . .

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with -

(i) property; or

(ii) an interest in property.

Section 102. Rules of construction

In this title -

. . .

(3) "includes" and "including" are not limiting; . . . .

Section 363(h). Use, sale, or lease of property

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for

the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

Section 541. Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is -

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

. . .

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Section 544(a). Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

Section 547(b). Preferences

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if -

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 550(a). Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.